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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 503

UNITED STATES OF AMERICA, APPELLANT

v.

PENN-OLIN CHEMICAL COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court, constituting its findings of fact and conclusions of law (R. 1543-1589),[1] is reported at 217 F. Supp. 110.

JURISDICTION

On May 15, 1963, the district court entered judgment dismissing the government's amended complaint (R. 1590), and the United States filed a notice of ap-

[1] "R." refers to the printed record in this Court; the government's (plaintiff's) exhibits are designated "PX"; and defendants' exhibits are cited as "DX". A compilation of the places in the record where each exhibit was offered and received into evidence is contained in the Appendix *infra*, p. 59.

peal on July 15, 1963 (R. 1591). Probable jurisdiction was noted on December 9, 1963 (R. 1593; 375 U.S. 938). Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, vests this Court with jurisdiction to review the judgment on direct appeal.

QUESTION PRESENTED

Olin Mathieson Chemical Corporation and Pennsalt Chemicals Corporation jointly formed the Penn-Olin Chemical Company to produce and market sodium chlorate in the southeastern United States. The question presented is whether this joint venture was prohibited by Section 7 of the Clayton Act and Section 1 of the Sherman Act where each parent corporation was independently capable of entering the market as a significant competitor and was seriously considering that course prior to formation of the joint venture.[2]

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal * * *.

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[2] There is no dispute about adjuvant determinations. Sodium chlorate was stipulated as a "line of commerce". The district court found that the southeastern United States was the appropriate "section of the country", and we do not challenge that finding.

The relevant paragraph of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, reads as follows:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from a final judgment of the district court (Steel, J.) dismissing after trial a civil antitrust action brought by the United States. The government's amended complaint (R. 1-9) charged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act. It alleged that Olin Mathieson Chemical Corporation ("Olin") and Pennsalt Chemicals Corporation ("Pennsalt"), through the joint formation of the Penn-Olin Chemical Company ("Penn-Olin") to produce and market sodium chlorate, had, *inter alia,* eliminated potential competition between themselves in the production and sale of sodium chlorate.

I

THE FACTS

A. THE COMPANIES INVOLVED

1. Olin

Olin is a large diversified industrial corporation formed in 1954 by the merger of Olin Industries, Inc. and Mathieson Chemical Corporation (R. 1546). Its chemical division, one of seven operating divisions, produces a wide range of chemicals and chemical products in plants located in 15 states, and accounts for about 30 percent of Olin's operating revenues (R. 1546). In 1960 Olin's net sales of chemicals and chemical products were $217 million; its total sales amounted to $690 million; its assets totaled $860 million; and it made capital expenditures of almost $49 million (R. 1546–1547).

In the early 1930's one of Olin's predecessors produced sodium chlorate for its own use (R. 1554). Olin itself, however, has never engaged in commercial production of this chemical, although it purchases sizeable amounts of sodium chlorate for internal consumption (R. 1567, and fn. 19; PX 406, R. 1266–1267). It also owns a patented process for bleaching pulp with chlorine dioxide; this "Mathieson process" consumes sodium chlorate, and is widely used by paper manufacturers under royalty-free licenses (R. 1553, and fn. 5). By 1960 most of the chlorine dioxide generated by paper manufacturers—100 percent in the west, and around 60 percent in the remainder of the country—was being produced under

the Mathieson process (R. 1552–1553; PX 188, 245, R. 773–776, 834).

2. Pennsalt

Pennsalt has been engaged in the chemical business for more than 110 years (R. 1546). Its sole activity is the production and sale of chemicals and chemical products throughout the United States (R. 1545). In 1960 Pennsalt's sales were more than $90 million, and it had assets of approximately the same amount (R. 1546). Since 1958 it has been engaged in a $55 million modernization and expansion program (R. 1546).

From 1941 on Pennsalt has been producing sodium chlorate at a single plant in Portland, Oregon (R. 1552). The capacity of the Portland plant has steadily been increased from 2,194 tons per year in 1941 to 15,392 tons in 1959 (R. 1552). Most of Pennsalt's sales of sodium chlorate have been to users located west of the Rocky Mountains (R. 1552) where, in 1960, it had 57.8 percent of the market (R. 1562). In that same year, Pennsalt, which had installed the Mathieson pulp-bleaching process in western paper mills under a 1953 agreement with Olin (see *infra*, p. 17), supplied 100 percent of the sodium chlorate used by those mills (R. 1552–1553).

Pennsalt also has marketed sodium chlorate in the southeastern United States since 1957 (PX 414, Table I (unprinted)). In 1960 it shipped 4,186 tons of the chemical, amounting to 27 percent of its total sodium chlorate sales that year, into the southeast (R. 1560). Of these shipments 3,203 tons were sold

for Pennsalt by Olin, acting as Pennsalt's sales agent under a contract of December 1957 (R. 1560; see *infra*, p. 17). These sales in the southeast provided an outlet for production which Pennsalt believed it could not have sold in the west (PX 220, 229, R. 812, 817).

3. Penn-Olin

Penn-Olin was organized on February 25, 1960, pursuant to a joint venture agreement between Olin and Pennsalt dated February 11, 1960 (R. 1547; PX 175, R. 736). Pennsalt and Olin each own one-half of its capital stock, and the positions as directors and officers are also divided equally between the two parents (R. 1547).

Penn-Olin's plant, located at Calvert City, Kentucky, was built at a cost of about $6.5 million; it has the capacity to produce 26,500 tons of sodium chlorate per year; and it began operations in September 1961 (R. 1547). By agreements executed in October 1961—implementing the February 11, 1960, understanding—Pennsalt has undertaken to operate the plant, and Olin has assumed responsibility for sales (R. 1547). Olin began to solicit sales on behalf of Penn-Olin around May 1960 (PX 226, 232, 408, R. 815, 823–825, 1384), and actual sales commenced in January 1961 (PX 286, 336–338, R. 866, 912–915).

B. THE SODIUM CHLORATE MARKET

1. The chemical

Sodium chlorate is produced commercially by electrolysis of an acidified solution of salt (sodium chloride) (R. 1549). All sodium chlorate of like purity

is fungible and can be used interchangeably (R. 1549). In 1960, 91,900 tons of the chemical, valued at around $18 million, were produced domestically: 54,600 tons east of the Rocky Mountains, and 37,300 tons in the west (R. 1549).

As noted above, the chemical is used primarily in the pulp and paper industry, which consumed 64 percent of total production in 1960 (R. 1550). It is also employed in the production of weed control herbicides, agricultural chemicals, and certain derivatives such as ammonium perchlorate (R. 1550).

2. The structure of the industry.

Prior to the formation of Penn-Olin three producing companies—Pennsalt, American Potash & Chemical Corporation ("AmPot"), and Hooker Chemical Corporation ("Hooker"), or their predecessors—made up the domestic sodium chlorate industry (R. 1550). Hooker, the largest of the three companies, entered the industry in 1956 when it acquired Oldbury Electro Chemical Company, which had been producing sodium chlorate since the turn of the century (R. 1550–1551). Hooker has two plants: one at Columbus, Mississippi, having a 32,000-ton capacity in 1960, and another at Niagara Falls, New York, with a capacity of 18,000 tons (R. 1551). AmPot, which entered the industry in 1955 through the acquisition of Western Electro Chemical Company, also has two plants, located at Henderson, Nevada (27,000-ton capacity in 1960), and Aberdeen, Mississippi (15,000 tons) (R. 1551).

The two most important geographic markets served by these companies were the southeastern and western United States (R. 1558). The southeastern market, with which we are concerned here, developed as follows: Hooker's predecessor had constructed a plant at Columbus, Mississippi, in 1954, the capacity of which almost doubled between 1957 and 1960 (R. 1551). AmPot authorized construction of a plant at Aberdeen, Mississippi, in 1957, to meet the growing demand in the southeast and to enable it to compete effectively in that area with Hooker's Columbus plant 1551.) The Aberdeen plant was in operation by 1959, and in 1961 its capacity was increased by 50 percent to 22,500 tons per year (R. 1551).

After the institution of this action two new firms entered the industry. Pittsburgh Plate Glass Company announced plans to construct a 15,000-ton-per-year sodium chlorate plant in the southeast, at Lake Charles, Louisiana (R. 1553). And Pacific Engineering & Production Company of Nevada has built a 5,000-ton plant in the west (at Henderson, Nevada), which presumably commenced production in late 1962 (see R. 1553).

C. THE JOINT VENTURE IN ITS COMMERCIAL SETTING

1. Background

As noted above, in the late 1950's the only producers of sodium chlorate in the United States were Hooker, AmPot, and Pennsalt. No new firms had entered the industry in the previous decade (R. 1571); prices were stable (PX 254, R. 846–847); and little effort

had been made to expand existing uses or to develop new ones (PX 146, R. 719).

During the 1950's the sodium chlorate market began to grow, chiefly because of the adoption and rapid expansion of chlorine dioxide bleaching in the pulp industry (R. 1550); domestic production more than quadrupled between 1950 and 1960 (PX 376, R. 928). This expansion was attributable primarily to the efforts of Olin and Allied Chemical Corporation (Solvay Division) in granting royalty-free licenses to pulp and paper manufacturers under their patented processes for the generation of chlorine dioxide (R. 1552–1553, and fn. 5; see *supra*, p. 4).[3] The growth has been most pronounced in the southeast. By 1960 that area had the heaviest concentration of sodium chlorate buyers, of which the pulp and paper mills were by far the largest, and nearly half the national sodium chlorate productive capacity (R. 1557). In that same year the southeastern market was divided among the three producers in the following proportions: Hooker (49.5 percent), AmPot (41.6 percent), Pennsalt (8.9 percent) (R. 1566).

2. Pennsalt's efforts to build a sodium chlorate plant in the southeast on its own

Prior to the joint venture, Pennsalt had long been interested in establishing a plant within the rapidly growing southeastern sodium chlorate market. As

[3] As of 1961 there were four different processes that could be used to generate chlorine dioxide from sodium chlorate; however, the vast majority of the chlorine dioxide used by pulp and paper companies was produced under the Mathieson and Solvay processes (PX 188, 245, 378, R. 773–776, 834, 939–940).

early as 1951 Pennsalt had made cost studies for a plant at Calvert City (see PX 61, R. 628), and from 1955 on it had given almost continuous consideration to the establishment of a facility in the southeast (R. 1572).

After considering and rejecting three different proposals during 1955-1956 (see PX 66, R. 634-635; R. 260-262, 363-364), Pennsalt's management (in January 1957) set up a "task force" to evaluate the company's future in sodium chlorate production in the east, "either alone or jointly with a partner such as Olin * * *" (PX 72, 73, 74, R. 637-640). The purpose of the study was "to find out how we can do it rather than why we can't" (PX 74, R. 640).

About seven weeks later the "task force" reported (PX 82, R. 643):

> Pennsalt's important position in sodium chlorate in the northwest has provided us with the manufacturing, selling, and technical service know-how required for the merchandising of this product. It would appear logical therefore for us to extend our position in the east provided we could be assured of a market potential of at least 15,000 tons per year.

The report estimated that a 15,000-ton plant at Calvert City would cost $4.8 million and would return 11.4 percent on investment (PX 82, R. 643). A 14.1 percent return was predicted for a 20,000-ton plant at the same location (PX 82, R. 644).

On the basis of those findings, Pennsalt retained a management consultant firm, Arthur D. Little, Inc., to study its sodium chlorate selling potential in the

east. The Little report extensively analyzed the market and concluded that "there appears to be an excellent opportunity for another supplier in the East" (PX 96B, R. 654). The following factors were stressed in the report as points favoring Pennsalt's entry into the market: Pennsalt "enjoys a good reputation in the pulp trade, it has the experience of the Northwest market to draw upon, and it has the Mathieson chlorine dioxide generating process. In addition, the judicious selection of a location for the new plant could help Pennsalt gain a stronger foothold in the Eastern pulping area" (PX 96B, R. 656).

On the basis of the Little report, Pennsalt's commercial development department recommended that the company build a plant for the manufacture of sodium chlorate in the east (PX 96C, R. 679). The department reasoned that Pennsalt could obtain a "sound" position in the eastern market because: (1) additional productive capacity was needed in the area, (2) Pennsalt's personnel were familiar with the technology of the chemical's use for pulp bleaching, etc., (3) its sales personnel were successfully marketing "companion products" to the pulp and paper industry, (4) Pennsalt had "an assured initial sales base with certain Eastern accounts * * *", and (5) Calvert City was an advantageous location from which to serve the pulp and paper market (PX 96C, R. 674, 676, 677–678).

Thereafter, at a staff meeting to discuss eastern chlorate opportunities, the heads of Pennsalt's eastern and western industrial divisions expressed their

view that Pennsalt could capture from 5000 to 8000 tons of the then existing sodium chlorate sales to paper manufacturers and some portion of the expanding demand, as well as an additional 5000 tons in the agricultural market (PX 99, R. 688). The staff then requested the company's chief engineer to prepare up-to-date cost estimates, and he reported that a 25,000-ton plant would return from 15.9 to 22.2 percent on total investment; and would cost about $7.2 million (PX 100, R. 691). In December 1957, however, Pennsalt's management, emphasizing that it considered the estimated rate of return to be unattractive, decided that unilateral construction of an eastern sodium chlorate plant was "unlikely" (PX 102, R. 692–693). In the same memorandum, a report on a management meeting in the president's office, it was pointed out that Olin would be "a logical partner" in a joint venture and that there were indications Olin "would be actively interested in distributing in the East 2,000 tons of our Portland chlorate production * * *." (PX 102, R. 692–693).

In early 1958 Pennsalt again revived its plans to enter the sodium chlorate market in the southeast as an independent entrepreneur. This time a combined ammonium perchlorate-sodium chlorate plant was proposed; the "primary objective for going into perchlorates * * * [was] to facilitate the justification for [sodium] chlorate manufacture in the South" (PX 122, R. 702). Arguing in favor of the inde-

pendent venture, a group of Pennsalt's officials stated (PX 146, R. 719):

> As the newest producer, Pennsalt should and could take leadership in (1) promoting sales aggressively, (2) extending existing uses, (3) developing new uses, (4) improving use technology.

It was estimated that a plant built at Calvert City would have returned 26.2 percent on total investment (PX 153, Table III (unprinted)). Final decision whether to build was postponed in January 1959, however, after discussions with Olin. It was decided that independent production should be reconsidered only if Olin did not desire to proceed further with a joint venture then under discussion (PX 154, 392, R. 727, 1061-1062). In April 1959 Pennsalt's president said that the unilateral project had been put to one side "pending receipt of word from [Olin]" on the joint venture (PX 166, R. 731). No final decision was made until the creation of Penn-Olin, as the district court found (R. 1573, and fn. 22).[4]

[4] Around the time Penn-Olin was formed, Pennsalt—in line with its views on the inadequacy of existing efforts to find new uses for sodium chlorate (see PX 146, R. 719)—began experiments to adapt the chemical for use in textile bleaching, in the hope that it would be given sales responsibility for the joint subsidiary (See PX 215, 399, R. 809, 1191). Pennsalt's sales manager testified that he did not look forward to continuing the research if Olin, and not Pennsalt, was to sell Penn-Olin's output (PX 399, R. 1190), as ultimately turned out to be the case (R. 1547).

3. Olin's independent efforts to enter the sodium chlorate industry as a producer

Beginning around 1950 Olin, too, investigated the possibility of entering the sodium chlorate industry in the eastern United States, and took various steps toward that end. It made plant location surveys, conducted experiments to develop a feasible production technology, and undertook negotiations to have a plant built (see PX 1–54, R. 441–607; R. 1572). Olin recognized that production of sodium chlorate was an "essential and integral" part of its chemical business, and that (PX 254, R. 846)—

> The product [sodium chlorate] is made by an electrolytic process using salt as the main raw material: This is intimately related to the extensive caustic-chlorine operations of Olin Mathieson. The same general technical knowledge is required and is transferable.

Moreover, the general manager of its chemical division "believe[d] that the sale of chlorate will give help in selling other chemicals to the paper industry" (PX 245, R. 835).

In early 1958 Olin's chemical division launched "a real drive on [its] part to go ahead with the chlorate production on its own" (PX 406, R. 1297). In April of that year the chemical division issued a "Whither Report" on its objectives for future expansion, which stated, *inter alia* (PX 15, R. 510):

> We have an unparalleled opportunity to move sodium chlorate into the paper industry as the result of our work on the installation of chlorine dioxide generators. We have a captive consumption for sodium chlorate.

Olin's engineering supervisor, in the course of preparing cost estimates for the chemical division, concluded that production of sodium chlorate was "an attractive venture" because (1) it "represents a logical expansion of the product line of the Industrial Chemicals Division", (2) "[w]ith respect to one of the major markets, pulp and paper bleaching, we have a favorable marketing position, particularly in the southeast", and (3) production of the chemical offered an attractive potential return (PX 22, R. 523–524).

About one year later, after much additional study, the chemical division recommended to management that Olin unilaterally construct a sodium chlorate plant in the southeast (PX 32, R. 565). As revised in October 1959 the recommendation advised construction of a 15,000-ton plant at Chattanooga, Tennessee, and predicted a 13.1 percent return on gross investment after taxes (see PX 32, 33, R. 570, 576). The chemical division argued that total demand for sodium chlorate would outstrip industry capacity by 1962 and had already done so in the southeast (PX 32, R. 564). It pointed out that Olin's technical service people had established valuable goodwill with firms in the pulp and paper industry; and it predicted that Olin could secure about one-third of the tonnage (around 14,000 tons per year) used by southeastern paper mills (PX 32, R. 564).

At this time, the manager of the chemical division felt that Olin probably would not proceed with a joint production facility, and that an independent plant was "definitely more of a possibility than it

had been previously * * *" (R. 227–229). Pennsalt, however, later came up with "new facts" in support of the joint venture, and, as the court found, Olin's management never finally decided whether to accept or reject the division's recommendation until the joint venture was consummated (R. 235, 1573, and fn. 22).

As part of its efforts to become a sodium chlorate producer, Olin, recognizing that development of a good practical electrolytic cell was the key to independent entry (see PX 406, R. 1281), undertook experiments to produce a viable cell and negotiations to purchase one (see PX 28, 33, R. 553, 571). Its experiments began in 1956, and by early 1959 Olin had constructed a cell using platinized titanium anodes that "operated for more than 100 days with very promising results" (PX 33, R. 573). Later in the year its experiments showed that "there was an excellent chance of our producing sodium chlorate at a cost lower than whatever the literature studies revealed * * *" (PX 406, R. 1279). Accordingly, in November 1959 it reached a tentative agreement with Vickers-Krebs, Ltd., a plant construction company, on a cooperative program for development of the platinized titanium anodes process (PX 51, R. 603). These plans to develop a new production technology were cancelled after Penn-Olin was formed and production responsibilities were assigned to Pennsalt (PX 401, R. 1220–1222).

4. The parents' joint activities antedating the formation of Penn-Olin

During the years when Pennsalt and Olin were conducting independent studies about the feasibility of

building their own plants, they were also discussing joint entry into the southeastern market (R. 1573). The first joint dealing between the parties (in 1953) was a licensing agreement, not related to the southeast, under which Olin promised to grant immunity from infringement suits to any pulp and paper companies designated by Pennsalt to use the Mathieson bleaching process (R. 1552–1553; PX 60, R. 625; see p. 5, *supra*).

The next joint arrangement was a sales agreement of December 1957 which was aimed, in part, at jointly testing the southeastern market (R. 1583). Under this agreement Pennsalt contracted to make available to Olin, as an exclusive seller, 2,000 tons of sodium chlorate per year for two or three years; and Olin agreed to sell the chemical "only to pulp and paper mills in the southeast," except for one company (Buckeye Cellulose Company of Foley, Florida) which Pennsalt "reserved the right to serve directly" (PX 104, R. 695; R. 1583).

The parties' final joint arrangement was a so-called production agreement dated February 3, 1958, in which each agreed that "neither * * * should move in the chlorate or perchlorate field without keeping the other party informed * * *", and each bound itself "to bring to the attention of the other any unusual aspects of this business which might make it desirable to proceed further with production plans" (PX 111, R. 700; see R. 1587–1588). The purpose of the latter agreement was to assure that each party would advise the other of any plans to independently enter the market before it would take any definite action (see R. 1588).

These agreements were in force until superseded by the joint venture agreement of February 11, 1960 (see R. 1583). The latter agreement, which was promptly announced in the hope that other potential competitors might thereby be deterred from entry and "the market might be preempted" (R. 1570), provided that the two corporations would engage in a joint venture by each taking 50% of the stock of a new corporation, Penn-Olin. The corporation was to spend (and did spend) approximately $6,500,000 to build a plant at Calvert City, Kentucky, with a capacity of over 25,000 tons. The plant began operations in 1961 with Pennsalt responsible for production and Olin in charge of sales for the corporation (R. 1547).

II

THE DECISION OF THE DISTRICT COURT

The district court found that the government had not shown that the effect of the joint venture "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act.[5] It also ruled that the joint venture did not violate the Sherman Act, noting merely that "the anticompetitive standard imposed by Section 7 of the Clayton Act is less stringent than that of the Sherman Act" (R. 1548). The parties had stipulated that sodium chlorate was an appropriate line of commerce (R. 1548–1549), and that the southeastern United States was a relevant geographic mar-

[5] Finding no violation, the court did not pass upon the disputed issue of Clayton Act coverage—*i.e.*, whether the joint formation of Penn-Olin involved an "acquisition" of the stock or assets of a corporation "engaged in commerce" (see R. 1548).

ket (R. 1555).[6] The court rejected the government's further claim that there also was a national market in sodium chlorate (R. 1563), and we do not press that contention here. In the southeastern market, the court found that Pennsalt and Olin had never been actual competitors (R. 1565).

The principal issue was whether the joint venture was unlawful in that it eliminated the potentiality of competition between Pennsalt and Olin in the southeastern market. On that point the court found that Pennsalt and Olin each had an extensive background in sodium chlorate—the former in manufacturing and selling, the latter having contacts with the chief purchasers, as well as experience in the technical aspects of bleaching pulp (R. 1572, 1574); that each had evinced long standing interest in independently entering the southeastern market (R. 1572); that each possessed the resources and general capability needed to build its own plant in the southeast (R. 1574); and that the forecasts of each company indicated that an independently operated plant could be run at a profit (R. 1574, and fn. 23). In addition, the court found that both Olin and Pennsalt could have been effective independent competitors of Hooker and AmPot in the southeast (R. 1574). Finally, the court ruled that prior to the joint venture neither party had made

[6] There was some dispute between the parties as to which states made up the southeastern market. The court found that the market consisted of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia (R. 1555, fn. 6).

a final decision not to enter the market alone (R. 1573).

Despite these findings the court held that the government had not shown that the effect of the Penn-Olin joint venture "may be substantially to lessen competition." From the premise that Penn-Olin would presumably be as effective a competitor as either of its parents alone, the court reasoned that the government was entitled to judgment only if it proved that "as a matter of probability *both* companies would have entered the market as individual competitors" in the absence of the joint venture (R. 1575, emphasis in original). Finding no evidence that Pennsalt and Olin would have "simultaneously" determined to build their own plants or that the construction of a plant by one would not have discouraged the other, the court concluded that the best that could be said for the government's case was "that one company would have decided to build while the other continued to ponder" (R. 1575–1576). If this was all that was shown as a reasonable probability, the court held, the government was not entitled to judgment.

SUMMARY OF ARGUMENT

I

Section 7 of the Clayton Act prohibits the acquisition by a corporation engaged in interstate commerce of all or part of the stock of another corporation also engaged in such commerce where the effect of the acquisition may be substantially to lessen competition. In the present case, Pennsalt and Olin acquired the

stock of a joint subsidiary, Penn-Olin, in order to engage in a joint venture which, we submit, will substantially lessen competition in what both parties agreed is the relevant market production and sale of sodium chlorate in the southeast.

A. Section 7 covers the acquisition by a corporation engaged in interstate commerce of the stock or assets of another corporation "engaged also in [interstate] commerce." An acquisition comes within this section if the acquired firm is either conducting an interstate business or is intending or preparing to do so. From its inception, Penn-Olin was intended by its organizers to engage in interstate commerce, and it immediately began to arrange for and conduct such business. It was therefore "engaged" in interstate commerce within the meaning of Section 7 when Pennsalt and Olin acquired its stock.

B. The effect of the Penn-Olin joint venture may be substantially to lessen competition. The district court's findings establish that Pennsalt and Olin were each fully capable of entering, and likely to enter, the sodium chlorate market in the southeast. They had each been considering building a plant in the southeast for some time, and neither had abandoned its plans for separate entry prior to the decision to collaborate. There is, moreover, no reason to believe that the entry of either Pennsalt or Olin would have caused the other to abandon its plans to enter the market, if not immediately, whenever a lack of competition in the market made entry desirable. It is thus probable that, if Pennsalt and Olin had not

formed Penn-Olin, either one or both of them would have entered the market and that, if only one of them had entered, the other would have remained a highly significant potential competitor.

Penn-Olin's entry into the southeastern market will furnish substantially less competition than either the entry of both Pennsalt and Olin or the entry of one of them, with the other remaining a significant potential competitor. Only two companies had plants in the southeast and competition would have plainly benefited from the addition of two additional competitors, instead of merely one (Penn-Olin). Even if only one of the companies had entered the market with a local plant and the other had remained a potential competitor, competition would have been substantially greater than with Penn-Olin alone. The potential competition of a company such as Pennsalt or Olin would significantly limit the control of prices and production shared by the three companies actively selling in the southeast. The threat of production, sales, or product innovations by a potential competitor with the ability of Pennsalt or Olin would serve as a constant spur to similar developments by those in the market. The joint venture ended not only these substantial elements of competition, but also the real chance that both Pennsalt and Olin would have consummated the plans they had repeatedly considered to build separate plants. For these reasons, the joint venture may result in a substantial lessening of competition in the market in the southeast.

II

The formation of Penn-Olin also constituted a combination and conspiracy between Pennsalt and Olin in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. The Sherman Act, like the Clayton Act, prohibits restraints of potential as well as actual competition, and the combination cannot escape condemnation under the Sherman Act because it took the form of a joint venture. The policy of the Clayton Act illuminates the general terms of the Sherman Act, and the facts which establish that the joint venture violates Section 7 of the Clayton Act establish that it also constitutes an unreasonable restraint of trade.

ARGUMENT

INTRODUCTION

A joint venture between two manufacturing companies for the purpose of entering a market in which neither has actively competed before may benefit or harm competition, and the harm, if any, may be substantial or insignificant depending upon the capabilities and prospects of the companies involved. At one extreme, if neither company can seriously consider entering the market alone, competition is obviously served by the combination. This would be the case if two small companies combined their resources in order to overcome substantial barriers to independent entry or to share risks or expenses manifestly too great to be borne by either

company alone. At the other extreme, if two large companies, each of which is capable of having a substantial competitive impact on a market, abandon serious consideration of separate entry in order to form a joint venture, competition would plainly be substantially lessened, for the addition of the joint venture to the market could not compensate for the loss of potential competition between the companies.

The latter example would, we submit, be prohibited by the Clayton and Sherman Acts for much the same reasons that, in many circumstances, a company actively selling in a market may not acquire a significant potential competitor which is likely to enter that market. The antitrust laws in general, and particularly Section 7 of the Clayton Act, condemn the destruction of "potential competition in a way later to make actual competition impossible * * *" *Aluminum Co. of America* v. *Federal Trade Commission,* 284 Fed. 401, 408 (C.A. 3), certiorari denied, 261 U.S. 616. In the case of the acquisition of a significant potential competitor by an active competitor, the potential competition is simply extinguished. In the case of a joint venture between two significant potential competitors, each of which might well have entered the market on its own, a single active competitor is substituted for two potential competitors so that the reasonable probability of substantial future competition is lost.

The loss of competition from a joint venture between two companies capable of entering the market separately, and independently likely to do so, results from the reasonable probability that, but for the joint venture, one of two alternatives would come to pass, either of which would furnish more competition than the joint venture. First, without the joint venture both companies might have become active competitors in the market. Second, without the joint venture one might have entered as an active competitor while the other would have had a significant impact on the market as a potential competitor, threatening entry whenever market conditions offered sufficient likelihood of profit. The presence of a potential entrant—waiting in the wings and capable of moving into the market—may be an indispensable source of protection for purchasers and ultimately the consuming public. Its readiness to enter the market whenever the existing manufacturers charge excessive prices, limit production, or fail to exploit economic opportunities (*e.g.*, to develop more efficient productive techniques) can act as a spur to insure the competitive vigor of those already in the market. "If economic superiorities of some kind are not possessed by the existing few, entry of new rivals is a continuing threat, likely to enforce behavior approaching the competitive norm." Weston, *The Role of Mergers in the Growth of Large Firms* (1953) 109.

In short, the harm to competition from a joint venture between two companies which are fully capable of, and actively considering, entering a market inde-

pendently is that it deprives an attractive market of the competitive benefits of having its full share of new competitors and potential competitors. It enables prospective entrants to act, prior to entry, to eliminate the threat of future competition between themselves for the indefinite future; for a joint manufacturing and sales venture generally involves an almost permanent dedication of resources and allegiance to the joint project. The companies combining may, in some cases, be so small and their prospects of adding significantly to competition in the market by independent entry may be so slight that the harm to competition is not substantial. But a joint venture between two companies, each of which would be a highly significant competitive factor in the market, will substantially lessen competition if there is a real likelihood that, without the joint venture, at least one would have entered the market independently and the other, at worst, would have remained a significant potential competitor and, at best, would have become an additional active competitor.[6] Competition is much

[6] This threat to competition is becoming increasingly real. Joint ventures are rapidly becoming a significant form of business association. In the chemical industry alone, 17 of the 54 leading corporations held interests, in 1958, in one or more joint subsidiaries. Comment, *Joint Subsidiaries and Section 7 of the Clayton Act*, 39 U. Det. L. J. 223, 224, citing Merrill Lynch, Pierce, Fenner & Smith, *Chemicals* (1958). Olin, for example, itself the outgrowth of a 1953 joint venture between Mathieson Chemical Corporation and Olin Industries, Inc. (PX 414, R. 1479), joined forces with Revere Copper & Brass, Inc. in forming the $250 million Ormet Corporation (and related subsidiaries) in 1956, and with Sun Oil Company, in establishing the

better served by the entry of one and the continuing presence of the other as a threatening potential competitor than by the entry of both as a single entity; and competition will be greatly benefited if both enter the market separately rather than jointly.

For these reasons we believe that the Clayton and Sherman Acts prohibit two companies from agreeing to enter a market as a single entity when each is fully capable of entering independently as a significant competitor and, in fact, is considering that course. This standard permits the use of a joint venture by two small and struggling companies neither of which could enter the market alone. It does not condemn a joint venture between two companies each of which could enter alone, if the loss of their competition would not be significant in view of their capabilities and the nature of the market. But it prohibits joint ventures which may substantially lessen competition because they substitute a joint undertaking for a real possibility either that two significant competitors will enter the market independently or that one will enter with the other remaining a potential entrant.

We believe that the government has met its burden of proof when it has shown that each of the companies involved in a joint venture was capable of entering the market, was independently considering that course, and would furnish a substantial increment to competition. That the government's

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$7 million SunOlin Chemical Company in 1958 (PX 414, R. 1480). Pennsalt, too, in 1954 formed the Solar Salt Company primarily in conjunction with Hooker (PX 414, R. 1481).

proof in the present case met this standard is established by the district court's findings of fact. Indeed, a detailed analysis of the probable consequences of the Penn-Olin joint venture furnishes forceful evidence of the probable injury to competition resulting from such a combination.

I

THE JOINT VENTURE BETWEEN PENNSALT AND OLIN VIOLATED SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act (*supra*, p. 3) prohibits certain corporate acquisitions of the stock or assets of corporations engaged in interstate commerce if there is a reasonable probability that the result of the acquisition will be a substantial lessening of competition. The Penn-Olin joint venture is prohibited by the statute. It involves the type of acquisition of the stock or assets of corporations engaged in commerce which is prohibited by the statute (a question which the district court did not decide), and the requisite detriment to competition is established by the district court's findings of fact, which are amply supported by the record.

We agree with the district court that the issue as to substantial lessening of competition depends upon a comparison between the state of competition with Penn-Olin as an active competitor in the relevant market and what probably would have occurred without the joint venture. Applying this test and accepting the district court's findings of fact, we submit that the joint venture must be condemned. There is a reasonable probability that, if Pennsalt and Olin had

not formed Penn-Olin as a joint venture, either both companies would have entered the southeastern market or one would have entered while the other remained a significant potential competitor threatening entry whenever lack of competition in the market made entry desirable. Since, as we shall show, in either event the market would have enjoyed substantially more competition than with Penn-Olin alone, there is a reasonable probability that the acquisition will substantially lessen competition in the southeastern market.

A. THE FORMATION OF PENN-OLIN INVOLVED AN ACQUISITION OF STOCK OR ASSETS COVERED BY SECTION 7 OF THE CLAYTON ACT

The prohibitions of Section 7 of the Clayton Act, as amended in 1950, cover (1) the acquisition by a corporation engaged in interstate commerce of all or part of the stock or assets "of another corporation engaged also in [interstate] commerce" and (2) the acquisition by a corporation subject to the jurisdiction of the Federal Trade Commission of all or part of the assets "of one or more corporations engaged in [interstate] commerce." "Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 342). The "corporate amalgamation" which the formation of Penn-Olin produced plainly was the kind of combination which, if it has the proscribed anti-competitive effects, Congress intended the amended Section 7 to reach.

A corporation is "engaged * * * in [interstate] commerce" within the meaning of Section 7 if, at the time of the acquisition challenged under that section, it is either conducting an interstate business or is intending or preparing to do so. Congress plainly did not intend an acquisition of a company, which was conceived and intended as an interstate firm, to escape the ban of Section 7 merely because, at the moment of acquisition the company itself had not yet produced or shipped any of its own goods. On the contrary, in view of the Congressional purpose in Section 7 to bar all mergers which posed any substantial threat to competition, the limitation of Section 7 to acquisitions of stock or assets of corporations "engaged * * * in [interstate] commerce" reflects only the Congressional intent that the section would not prevent corporations engaged in interstate commerce from acquiring wholly intrastate firms. This conclusion is strongly supported by the third paragraph of Section 7 which provides that the statute shall not prohibit a corporation engaged in commerce from forming subsidiary corporations under certain stated conditions. Since a subsidiary corporation cannot be actively engaged in interstate commerce at the moment of its formation, it is apparent that the acquisition of the stock of a subsidiary not actively engaged in commerce but conceived and intended as an interstate firm was thought to be within the prohibitions of the statute except where the stated conditions were met.

Penn-Olin plainly was "engaged" in interstate commerce within the meaning of Section 7 when Pennsalt

and Olin acquired its stock.[7] From its inception, Penn-Olin was intended by its organizers to engage in interstate commerce, and it immediately began to arrange for and conduct such business. Even prior to Penn-Olin's incorporation on February 25, 1960, pursuant to an agreement which Pennsalt and Olin had reached two weeks earlier (R. 1547), the latter companies had begun preparations for its functioning. Thus, they had initiated freight rate and site location studies and technological investigations (PX 189, 194, 205, R. 777, 785–787, 799–800). After they each acquired one share of Penn-Olin stock in March 1960,[8] they began sales development efforts, and so-

[7] The applicability of Section 7 to the formation of Penn-Olin may also be sustained on two other theories: (1) that Pennsalt and Olin, each engaged in interstate commerce, indirectly acquired the assets of the other through Penn-Olin when they transferred a part of their assets to the latter and acquired part of its stock; (2) that Penn-Olin itself acquired the assets of corporations engaged in interstate commerce, *i.e.*, assets of Pennsalt and Olin.

[8] Pennsalt and Olin each ultimately acquired a total of 500 shares of Penn-Olin stock as follows:

1 share on March 22, 1960 [PX 317, R. 901]
75 shares on November 17, 1960 [PX 320, R. 902]
200 shares on January 3, 1961 [PX 322, R. 903]
100 shares on February 16, 1961 [PX 323, R. 904]
124 shares on March 22, 1961 [PX 324, R. 905].

Only one share apiece was physically issued to Pennsalt and Olin (see PX 295, R. 880). The issuance of certificates for the remainder of the stock was delayed by the secretary of Penn-Olin because of some problems in connection with the transfer of land from Pennsalt to the subsidiary and the institution of this action (PX 396, 405, R. 1158–1161, 1258–1261). However, Pennsalt and Olin considered all the shares as "having been purchased" as of the date payment therefor was deposited in Penn-Olin's bank account (see PX 311, 312, 396, R. 891–892, 1159–1160).

licited sales (PX 226, 232, R. 815, 819–820, 823–825; DX 45, R. 1537–1539). The manager of Olin's chemical division testified that, in the fall of 1960, Olin was soliciting sales of sodium chlorate in Olin's name, but "with the recognition that at the initiation of Penn-Olin production the supply of chlorate under the contracts it was consummating would initiate from Penn-Olin's production" (PX 408, R. 1384). During the same period, arrangements were made with Pennsalt and Ampot for Penn-Olin, until it began producing, to purchase sodium chlorate from them for resale (PX 269, p. 1, PX 398, pp. 12–15 (unprinted); PX 265, R. 857–858). Penn-Olin began to make actual deliveries under this arrangement on January 1, 1961, pursuant to contracts executed around December 1960 (PX 286, 287, 336, 337, 338, 408, R. 866–869, 912–915, 1379–1384). Moreover, both Pennsalt and Olin contemplated that as soon as possible Penn-Olin would begin to service Pennsalt's existing eastern customers (PX 424, R. 1492; PX398, pp. 29–30, 60–61, PX 408, pp. 195–196 (unprinted)).

Thus, long before Penn-Olin began its own production, sale and delivery of sodium chlorate, it had begun its sales activities and had made arrangements to purchase the chemical from other producers for resale. In any realistic sense, therefore, Penn-Olin was "engaged" in interstate commerce when Pennsalt and Olin acquired its stock, even though at that time its own production and interstate distribution of sodium chlorate was just getting under way. To permit the combination of Pennsalt and Olin in this new company to escape the prohibitions of Section 7 because

of the claim that the new company was not yet actually "engaged" in commerce when its two organizers acquired their interests would elevate form over substance, and would ignore the Congressional purpose to "bring the entire range of corporate amalgamations * * * within the scope of § 7" (*Philadelphia Bank, supra*). As the court explained in *Aluminum Co. of America* v. *Federal Trade Commission*, 284 Fed. 401, 407 (C.A. 3), certiorari denied, 261 U.S. 616, in rejecting a similar challenge to a Commission determination that Alcoa's acquisition of stock in a new corporation formed to take over part of the existing business of another company violated Section 7: "Assuming for a moment that at the time of the stock acquisition the new corporation had not become engaged in commerce * * *, we doubt that the Aluminum Company could be saved from violating [Section 7] in view of the next fact that by the terms of the arrangement the Aluminum Company at once put the new corporation into commerce * * *."[9] The *Alcoa* case also indicates that Section 7 applies because Penn-Olin was intended to take over Pennsalt's existing interstate operations of selling sodium chlorate to eastern customers. Cf. also, *United States* v. *New England Fish Exchange*, 258 Fed. 732, 743–744, 746 (D. Mass.).

[9] "Certainly, it is logical to conclude that any corporation organized for commercial purposes and involved in the issuance of stock is 'engaged in commerce' even though it may not have begun manufacturing operations." Comment, *Joint Subsidiaries and Section 7 of the Clayton Act*, 39 U. Det. L. J. 223, 228.

B. THE PENN-OLIN JOINT VENTURE MAY SUBSTANTIALLY LESSEN COMPETITION IN THE SOUTHEASTERN MARKET FOR SODIUM CHLORATE

There is in the present case no dispute about the product and geographic markets in which the effect of the joint venture between Pennsalt and Olin is to be measured. The district court found and both parties agreed "that there is a relevant southeastern market in sodium chlorate" (R. 1555). The sole question as to effect on competition is whether the government met its burden of proving that the effect of the joint venture, in this product and geographic market, may be substantially to lessen competition. It is our contention that the government's evidence and the trial court's findings establish a reasonable probability that, but for the joint venture, either both Pennsalt and Olin or one of them would have entered the market, and that if only one had entered, the other would have remained a significant potential competitor. Since, as we shall show, this would have resulted in substantially more competition in the market than there will be with the Penn-Olin joint venture, the effect of the joint venture "may be substantially to lessen competition."

The district court did *not* find that the government had failed to show a probability that either one or both of the companies would have entered the market and that, if only one had entered, the other would have remained a significant potential competitor. The court did not resolve this question (see R. 1575) because it concluded that the government could not show a substantial lessening of competition by establishing

"that one company would have decided to build [a plant in the southeast] while the other continued to ponder" (R. 1575–1576).

The trial court held that, to establish that the joint venture may substantially lessen competition, the government had the burden of showing a reasonable probability that "*both* companies would have entered the market as individual competitors if Penn-Olin had not been formed" (R. 1575, emphasis in original). We submit that this holding is erroneous as a matter of law. A substantial lessening of competition could—and in this case would—result from the joint venture even if, without it, only one of the companies would have entered the market while, in the words of the district court, "the other continued to ponder," threatening entry whenever market conditions offered a profit.

1. There Is A Reasonable Probability That If Pennsalt And Olin Had Not Formed Penn-Olin As A Joint Venture, Both Would Have Entered The Southeastern Market Or One Would Have Entered While The Other Remained A Significant Potential Competitor, Threatening Entry Whenever Market Conditions Made Entry Desirable

As we have indicated, we do not believe the district court made a contrary finding as to this point. Indeed, as we shall show, its findings on subordinate facts establish a reasonable probability that, either both companies would have entered the southeastern market or, at least, "one company would have decided

to build while the other continued to ponder," posing a substantial threat of future competition to those companies already active in the southeast.

a. Pennsalt and Olin Were Each Fully Capable Of Entering And Independently Likely To Enter The Sodium Chlorate Market In The Southeast

The district court found that "Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete with Hooker and AmPot in that market" (R. 1574). This finding is compelled by the record, as the district court's opinion demonstrates (R. 1574):

> At the time when the joint venture was agreed upon Pennsalt and Olin each had an extensive background in sodium chlorate. Pennsalt had years of experience in manufacturing and selling it. Although Olin had never been a commercial manufacturer, it possessed a substantially developed manufacturing technique of its own, and also had available to it a process developed by Vickers-Krebs with whom it had been negotiating to construct a plant. Olin had contacts among the southeastern pulp and paper mills which Pennsalt lacked, but Pennsalt's own estimates indicate that in a reasonable time it would develop adequate business to support a plant if it decided to build. A suitable location for a plant was available to each company—Calvert City, Kentucky, for Pennsalt, and the TVA area around Chattanooga, Tennessee, for Olin. The financing required would not have been a problem for either company. * * *

Pennsalt and Olin were acutely aware that economic conditions in the southeastern sodium chlorate industry invited entry. The highly concentrated market contained the plants of only two producers; neither of which had been competing very aggressively (see *supra*, pp. 8–9): The market had been growing rapidly, and the parties forecasts were that the growth would continue. Both Pennsalt and Olin had extensive experience with paper mills, the area of greatest growth—Pennsalt in the west, servicing the mills it had licensed under the Mathieson process, and Olin in the southeast, acting as Pennsalt's sales agent (see *supra*, pp. 5–6).

Each company concluded that it could operate profitably in this market. For example, Olin estimated it could obtain a 13.1 percent return on gross investment after taxes from a 15,000 ton sodium chlorate plant at Chattanooga, Tennessee (see PX 32, 33, R. 570, 576). This compared very favorably with Olin's return of 6.4 percent on gross investment in its total chemical operations and its return of 8.3 percent in its industrial chemical division (PX 428, R. 1499). Am Pot had constructed its southeastern plant anticipating only an 8 percent return after taxes on total capital investment (PX 415, R. 1484). Much the same is true of Pennsalt. Its anticipated return on a plant in the southeast was, under several of its plans, highly attractive (see *supra*, pp. 10, 12, 13) and more than comparable to the return it was realizing from its overall chemical activities (PX 151, R. 725).

Each company had compelling business motives for expanding into the southeastern market. For Pennsalt, geographic expansion into the southeast was necessary if it was to keep pace with AmPot and Hooker, each of which had two plants in operation by 1959 (see *supra*, p. 7).[10] Olin, on the other hand, was motivated to become a producer of the chemical by "the fact that [it was] already buying and using a fair quantity for the production of sodium chlorite and that [it was] promoting the Mathieson process for the generation of chlorine dioxide which uses sodium chlorate" (PX 406, R. 1267). Olin had expended much time, effort, and resources in granting free licenses and servicing under the Mathieson pulp bleaching process. It felt that it "must get a return on the effort put into chlorine dioxide generation installations" (PX 254, R. 846); and the only way of doing so was to commence with the production and marketing of sodium chlorate. In addition, Olin's internal consumption of sodium chlorate assured that production of the chemical would be a sound business move.

While we do not believe any proof in addition to that discussed above was necessary to establish the requisite reasonable probability of the parents' in-

[10] Pennsalt's concern that it was lagging behind the field is reflected in its president's comment that Hooker's expansion of its southeastern facilities, in 1956, "makes us look kind of silly when we consider the number of times we have evaluated unsuccessfully the installation of a chlorate plant in the southeast. I think we should plan to review this matter once again * * *" (PX 71, R. 636).

dependent entry, there is further record support for that conclusion. Both Pennsalt and Olin had for some time been carefully considering entering the southeastern market as independent producers. The district court found that "[t]he interest which Pennsalt had in building a sodium chlorate plant in the southeast was of long standing", and that "Olin's interest in manufacturing and selling sodium chlorate in the southeast for its own account likewise antedated the joint venture by a number of years" (R. 1572).

By the mid-1950's, at the latest, southeastern production of sodium chlorate was more than just another project vying for the companies' excess resources; on the contrary, it had become a permanent part of the future expansion plans of both Pennsalt and Olin (see *supra*, pp. 9–16). Both had intensively analyzed the economic situation in the southeast, and both had received favorable reports. On the basis of those reports, both were determined to enter the market. The principal question facing their managements was whether to do so in concert or separately. That question, as the district court found (R. 1573, and fn. 22), had not been finally resolved by either company until the formation of Penn-Olin; their interest in unilateral projects continued right up to the end (see *supra*, pp. 13–16).

For example, in November 1958 tentative approval was reached at a Pennsalt management meeting for a plan to build a 30,000-ton sodium chlorate plant at Calvert City, Kentucky (R. 1588). The plan was never rejected prior to the formation of Penn-Olin; it was put to one side pending action on the joint

venture (see R. 1573–1574, fn. 22). And, both in April and October 1959, Olin's chemical division recommended that Olin independently construct a 15,000-ton sodium chlorate plant in the southeast. "Olin's corporate staff did not disapprove or otherwise act upon the October 1959 report prior to the joint venture decision of 1960" (R. 1589).

Accordingly, there is every reason to conclude that Pennsalt and Olin were each capable of entering and independently likely to enter the southeastern market. Indeed, one or both might well have entered the market by 1960 but for the fact that for several years they had been considering and discussing a joint venture. Internal memoranda make clear that as early as 1957 Pennsalt was studying the possibility of a joint venture "with a partner such as Olin Mathieson * * *" (PX 74, R. 640). In early 1959 it was decided that independent entry should not be considered further unless negotiations with Olin fell through (*supra*, p. 13). Much the same was, of course, true of Olin. Olin's principal negotiator, vice-president John Logan, said (PX 408, R. 1395):

> From the first conversations with Mr. Shanaman [a Pennsalt vice-president] the possibility of either of the parties producing independently or both of the parties producing jointly were alternates that were discussed constantly up until the time of the final decision.

After 1958 independent entry was further discouraged by the parties' "production agreement" (*supra*, p. 17) which required each company to inform the other before making any move toward separate entry.

Each company, in fact, kept the other advised pursuant to this agreement of its plans for separate entry.[11]

In sum, prior to the formation of Penn-Olin, there was a reasonable probability as to each parent that, but for the prospect of the joint venture, it would have entered the market alone. Each was capable of independently entering the market; each had good business reasons for doing so; economic conditions were favorable; and each had put to one side a concrete plan for independent construction of a plant, so as to appraise a proposed joint undertaking once more. The principal factor holding up independent entry was the possibility of a joint venture, and not doubts as to the feasibility of going it alone.[12]

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[11] For example, Pennsalt notified Olin of its ammonium perchlorate-sodium chlorate plans (PX 111, R. 700; see PX 154, R. 726–727); and Olin informed Pennsalt of its plans, during 1959, for an independent plant at Chattanooga (R. 218–219; see PX 168, R. 731). Decisions on both proposals were ultimately postponed, though not finally rejected, after the parties met and evaluated their independent prospects against chances for a joint venture (see *supra*, pp. 13, 15–16).

[12] Indeed, even after the joint subsidiary had been incorporated there was a period during which the parents moved back toward independent entry. In August 1960, Olin reappraised the Penn-Olin project and decided to reject it because, among other things, the expected rate of return (between 7.1 and 9.3 percent) was too low, and the project provided little opportunity for future expansion (PX 245, R. 836–837). At that moment the prospects for independent entry by both Pennsalt and Olin were extremely favorable. The compelling considerations urging them to begin sodium chlorate production in the southeast were still existent; a joint undertaking was less likely than at any previous time; and each possessed a concrete, practical plan, only about one year old, under which it could have entered the market separately—Pennsalt, immediately; Olin after giving Pennsalt the opportunity to

b. There Is No Reason To Believe That The Entry Of Either Pennsalt Or Olin Would Have Caused The Other To Abandon Its Plans To Enter The Market, If Not Immediately, Whenever Lack Of Effective Competition Or Other Market Conditions Offered The Prospect Of Profit

Neither Pennsalt's nor Olin's plans and hopes of entering the southeast market were conditioned upon being the first to enter. Both companies had canvassed the sodium chlorate industry for a decade; for the last five years their analyses were constant and comprehensive, and had resulted in the formulation of specific plans for independent entry into the southeastern market (see *supra*, pp. 9–16). During this period, each was well aware of the other's interest in entering the market on its own; in fact, they had agreed that neither would make any independent moves in the field without first informing the other (PX 111, R. 700). Yet neither company gave any indication that it contemplated abandoning its plans for entry if the other entered first. Moreover, the specific plans of each for independent entry were not deterred by the likely possibility that, after its entry, the other would also enter the market.

Additional objective evidence establishes that the prior entry of one of the two would not have rendered the market substantially less tempting to the other. The parties' construction of the joint Penn-

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enter first, which Olin felt it would owe Pennsalt as a "moral obligation" (PX 245, R. 836). Again, these prospects were destroyed by resuscitation of the joint venture (see PX 251, R. 840–842).

Olin plant with a 26,500-ton capacity (R. 1547) shows that they believed a market existed in the southeast for at least that much additional sodium chlorate. In these circumstances, construction by the first entrant of a 15,000-ton plant, as was likely (see *supra*, pp. 10, 15), presumably would not have dissuaded the other from entering on its own. Even after Penn-Olin had announced its intention of entering the market, Pittsburgh Plate Glass decided to enter with a 15,000-ton plant (R. 1569) "because an appraisal of market conditions convinced it that regardless of the outcome of the present litigation, additional sodium chlorate capacity was needed in the southeast and that after its plant was built, it would be able to obtain a fair share of the market for itself" (R. 1570).

The district court stated that (R. 1576):

> * * * Pennsalt and Olin were each hesitant to build a plant of its own in a market occupied by two competitors. Whether the imminent presence of a third competitor might have made the prospect more or less appealing cannot be foretold. Neither company had ever faced the problem. The record affords no clue as to what action might have been taken if the problem had arisen.

The court ruled that "[i]t is therefore impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created" (R. 1576, emphasis in original). Whatever may be true of the probabilities that *both* Pennsalt and Olin would have built plants in the immediate future, there is every reason to conclude that, as a matter of reasonable probability, at least one would have built

and, if only one, the other would have continued to be a highly significant potential competitor. For, as we have shown, the evidence as to the capabilities of the parties, the state of the market, the intention of each to enter despite knowledge that independent entry might well be followed by entry of the other, and the absence of any indication of an intention to abandon long-established plans for entry in the likely event of being beaten to the punch—all support the conclusion that the interest of each in entering the southeast would have survived the prior entrance of the other.

2. Penn-Olin's Entry Into The Southeastern Market Will Furnish Substantially Less Competition Than Either (a) The Entry Of Both Pennsalt And Olin Or (b) The Entry Of One Of These With The Other Remaining A Significant Potential Competitor

a. The district court assumed, without deciding, that the presence of both Pennsalt and Olin as active competitors in the southeastern market for sodium chlorate would result in more competition than will be furnished by the Penn-Olin joint venture. The southeastern market had, at the time of the joint venture, only three competing sellers. Hooker and AmPot, which alone had plants in the area, together had 91 percent of the market. Pennsalt, selling in large part through Olin, had the remaining 9 percent of the sales. This was, without question, a market in which competition would be greatly benefited by the addition of the plants of two able and vigorous competitors, rather than merely one.

Both Pennsalt and Olin showed promise of becoming such competitors. They were of a size which compared favorably with that of Hooker and AmPot. In 1960, Pennsalt's sales amounted to over $90 million; Olin's were $690 million; Hooker's were $150 million; and AmPot's were less than $51 million. As we have spelled out in detail above, both Pennsalt and Olin possessed every type of resource, capability, and knowledge required to compete successfully in the southeast. Each was, moreover, capable of building, and had planned to build, a facility with a capacity of at least 15,000 tons (see PX 32, 82, R. 565, 643), an amount equal to AmPot's 1960 capacity in its southeastern plant (R. 1551) and sufficient to serve a very large percentage of the southeastern market.

What is perhaps most important, both Pennsalt and Olin promised to become vigorous competitors in this market. Some of Pennsalt's officials, aware of the sluggish state of the industry and the unimaginative approach to technological development exhibited by the incumbents, believed that efforts "to expand existing uses or to develop new uses * * * should be very rewarding" (PX 146, R. 719). They felt that Pennsalt, if it entered on its own, could "take leadership" in aggressively promoting sales and technological development of sodium chlorate (PX 146, R. 719). Olin's initiative had already been demonstrated by its extensive campaign to induce acceptance of its Mathieson bleaching process by the paper industry (see *supra*, pp. 4, 5, 15). As late as 1960, in view of the impending production of sodium

chlorate by Penn-Olin, Olin considered it imperative that "we have installation of our chlorate dioxide process in as many mills as possible and that we do everything within our power to retain and enhance the general acceptance of our process by the paper industry" (PX 218, R. 811). Surely no lesser effort could be expected from Olin acting solely on its own, rather than for the joint benefit of both parents.

In these circumstances, the substantiality of the additional competition that would result from the presence of both Pennsalt and Olin as active competitors with plants in the southeastern market is plain, and the substitution of a single joint venture for these two competitors would have an "inherently anticompetitive tendency." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 366.

b. The district court did not question the significance of the competitive role that either Pennsalt or Olin could provide. It found that "when the joint venture agreement was signed, Pennsalt and Olin each possessed the resources and general capability needed to build its own plant in the southeast and to compete with Hooker and AmPot in that market," and it added that each could have competed profitably (R. 1574). The court held, however, that the government had failed to prove that both Pennsalt and Olin would have entered the market, "[s]o that the best possible postulate on which the Government's case can be based is that one company would have decided to build while the other continued to ponder" (R. 1575–1576). In the court's view, this de-

feated the government's case, for there was every reason to suppose that Penn-Olin would be as effective a competitor as either Pennsalt or Olin alone. In thus concluding that the government could not show a substantial lessening of competition unless it proved a reasonable probability that *both* Pennsalt and Olin would have entered the market, the district court erred; it wholly ignored the substantial lessening of competition that results from the elimination of the potential competition of the firm which did not enter immediately but "continued to ponder," threatening entry whenever competitive conditions made this desirable.

"Potential competition, either as a supplement to actual competition or as a substitute for it, may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy. * * * [I]nsofar as the threat survives, [it] may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets."[13] The importance of potential competition depends, of course, upon the capability and availability of the potential competitor and upon the amount of competition furnished by the companies already active in the market and other potential competitors. But there can be little question as to the

[13] Wilcox, *Competition and Monopoly in American Industry*, T.N.E.C. Monograph No. 21 (1940) 7–8.

substantiality of the benefit to competition of having a capable, imaginative, and aggressive competitor waiting in the wings to enter an oligopolistic market, containing only three active companies (and few similarly capable and interested potential competitors), whenever the level of prices or production or innovation made entry desirable. This is the situation in the present case. If the joint venture had not been available to Pennsalt and Olin, there is a reasonable probability that one would have entered the market in place of Penn-Olin and the other would have, at the very least, remained a highly significant potential competitor in a market that badly needed such competition.

The importance of the elimination of this potential competition is plain. "The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements * * *."[14] In the pres-

[14] *Report of the Attorney General's Nat'l Committee to Study the Antitrust Laws* (1955) 320; see *Proctor & Gamble Co.*, Docket No. 6901, decided by the Federal Trade Commission on November 26, 1963 (mimeo opinion), p. 61.

ent case a very small group of sellers has the power to choose its level of profits in the southeastern market for sodium chlorate. The nature of oligopolistic competition is such that there is little incentive for any of these to compete in price or innovation, for each firm can anticipate that its competitive efforts will quickly be met by offsetting actions of its rivals, perhaps leaving all of them with less profits than prior to the round of competition. There is every likelihood that the very few competitors in the market will quickly conclude that an absence of competition is to the benefit of each.

In this situation workable competition depends almost entirely upon capable and readily available potential entrants to keep the power of the active companies in check by threatening to enter the market and thereby reduce the market shares and profits of all of the active companies. While higher profits through higher prices and limited production is a readily achievable end of the companies selling in a tightly oligopolistic market, such companies realize that the same factors provide an immediate incentive for entry by potential competitors. While price-cutting to increase one's market share may be considered ungentlemanly conduct by the three companies actively selling in a market, the maintenance of prices at a low enough level to avoid inviting the entry of a potential competitor is an understood necessity.

If either Pennsalt or Olin constructed a plant in the southeastern market instead of Penn-Olin (which was probable but for the joint venture), the other would, at the very least, have remained a potential

competitor of the most threatening kind. The company remaining behind would, as we have shown, have every requisite capability of resources, know-how, and good will. Both Pennsalt and Olin were aggressive, interested in entry, and imaginative. There were few other companies of similar capabilities and interest which could also provide a useful competitive threat to those selling in the southeast. An increase in profits for the active companies would have been reflected immediately in either Pennsalt's or Olin's calculation of expected return on an investment in the market. Since both Pennsalt and Olin repeatedly recalculated their prospective returns from a plant in the southeast and postponed immediate entry only in the hope of finding higher returns, the active companies would have had to consider price changes and production limitation in light of the immediate effect of these on an eager potential entrant.

Beyond this, if Olin had entered the market as an active competitor, by building its own plant, Pennsalt would have remained an active as well as a potential competitive force in the southeastern market. Pennsalt had demonstrated its ability to make sales in the southeast even from its plant in the northwest. Part of its sales in the southeast were attributable to Olin's efforts as sales agent for most of Pennsalt's sales to pulp and paper mills there. But, without the assistance of Olin, Pennsalt had captured seven percent of the admittedly much smaller southeastern market for sales of sodium chlorate to users other than pulp and paper mills (R. 1561), and it can be fairly as-

sumed that it would have retained at least a somewhat comparable share of sales to pulp and paper manufacturers even if it did not decide to build another plant in the market.

It is, of course, impossible to demonstrate the precise effects upon prices and production of the elimination of either Pennsalt or Olin as a potential competitor waiting to enter the sodium chlorate market in the southeast. But the record does show, at least in part, how the joint venture affected competition in product and sales innovation in the market. In aid of its independent efforts to enter the market, Olin had undertaken in 1956 to develop a cheaper method of producing sodium chlorate (PX 406, R. 1279). Early in 1959, its experiments showed some "very promising results" (PX 33, R. 573); and by the end of that year Olin felt it had an "excellent chance of * * * producing sodium chlorate at a cost lower than whatever the literature studies revealed * * *" (PX 406, R. 1279). After it had been decided that Olin was to enter a joint venture and was to have no responsibility for Penn-Olin's production, Olin canceled any further experiments in this field (see PX 401, 406, R. 1220–1222, 1277).

Pennsalt likewise had been running tests to find new uses for sodium chlorate in textile bleaching. It began when plans for the joint venture already were in the works, but proceeded cautiously because its sales manager felt that "if [Olin] is going to have complete control of sales, maybe there isn't much

point in our wasting time * * *" (PX 215, R. 809). He believed that Pennsalt should not use its resources to "promot[e] a process that Olin Mathieson is going to go out and sell" (PX 399, R. 1190). As of September 1961 the laboratory work was continuing, but Pennsalt was "certainly not going to pursue it too aggressively until the whole thing kind of settles down, until we kind of find out exactly where we stand" (PX 399, R. 1190). Thereafter, Olin was designated as sole sales agent for the joint subsidiary.

There is no reason to suppose that either of these creative efforts would have been discontinued or slowed down had not Pennsalt and Olin been contemplating a joint venture. On the contrary, the probability is that even if one of the companies had not entered the market immediately, it would have continued to pursue its experiments in the hope of obtaining a capability which would enable it to enter the market profitably at a future date. Beyond this, the active competitors would have been called upon to respond with competitive innovations of their own. All this was eliminated by the joint venture.

In sum, even if it be assumed that only either Pennsalt or Olin would have entered the market with a local plant and the other would have remained a potential competitor, the loss to competition through the joint venture's elimination of the potential competitor is plainly substantial. The potential competition of a company such as Pennsalt or Olin would

significantly limit the control of prices and production shared by the three companies with plants in the southeast. The threat of production, sales, or product innovations by potential competitors of the ability of Pennsalt and Olin would serve as a constant spur to similar development by those in the market. The joint venture ended these substantial elements of competition, as well as the real chance that both Pennsalt and Olin would have consummated the plans they had repeatedly considered to build separate plants. For these reasons, the joint venture may result in a substantial lessening of competition in the market in the southeast.

Finally, even if it were relevant, the record is barren of any indication of benefits to competition from the joint venture that could compensate for and justify the lessening of competition which, as a matter of reasonable probability, the joint venture will cause. We therefore submit that the acquisition is forbidden by Section 7 of the Clayton Act.

II

THE JOINT FORMATION OF PENN-OLIN WAS A COMBINATION IN RESTRAINT OF TRADE IN SODIUM CHLORATE IN THE SOUTHEASTERN UNITED STATES, IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT

The district court, concluding that the formation of Penn-Olin did not violate the Clayton Act, did not consider the further question whether it transgressed the Sherman Act. If this Court holds that the joint venture was an offense under Section 7, it need not

reach the Sherman Act issue. However, if the Court were to conclude that the transaction did not come within Section 7 (see *supra*, pp. 29–33), then the Sherman Act issue would be presented for decision.

Although the 1950 amendments to the Clayton Act promulgated a "standard of illegality stricter than that imposed by the Sherman Act" and were intended to arrest restraints of trade "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding," [15] we believe that the concerted action involved in the present case violated the Sherman Act as well as the Clayton Act because of the harm to competition discussed above.

First, the Sherman Act, like the Clayton Act, outlaws restraints of potential as well as of actual competition. See *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 150–153; *United States* v. *Griffith*, 334 U.S. 100, 107; *United States* v. *Reading Co.*, 226 U.S. 324, 351, 369–371; *United States* v. *United Shoe Machinery Corp.*, 247 U.S. 32, 53. "[N]either the letter of the statute [Sherman Act] nor its purpose distinguishes between strangling a commerce which has been born and preventing the birth of a commerce which does not exist," *United States* v. *Patterson*, 59 Fed. 280, 283 (D. Mass.), for "so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented," Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C.A. 2).

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[15] S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5; see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319, fn. 33.

Nor does the organization of the combination between Pennsalt and Olin in the form of a joint venture in any way limit the applicability of the Sherman Act. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, the Court held that British Timken, American Timken, and their jointly owned subsidiary, French Timken, had unlawfully agreed to allocate trade territories. Defendants argued that the restraints were "ancillary" to a joint venture between American Timken and one Dewar, the major stockholder of British Timken. This Court noted, first, that the district court had found that the parties' dominant purpose was to restrain trade, but continued:

> Regardless of this, however, appellant's argument must be rejected. * * * Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture". Perhaps every agreement and combination to restrain trade could be so labeled. [341 U.S. at 598.]

See also, *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 592–593 (S.D. N.Y.); *United States* v. *Minnesota Mining and Mfg. Co.*, 92 F. Supp. 947, 958–959 (D. Mass.); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524, 530 (S.D. N.Y.), affirmed, 332 U.S. 319.

Second, the fact that an acquisition would violate the substantive prohibitions of Section 7 of the Clayton Act, if the jurisdictional prerequisite had been

satisfied, should be given great weight in determining whether it amounts to an unreasonable restraint of trade in violation of the Sherman Act. As this Court stated in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 507, fn. 7:

> It must be assumed * * * that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether the acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints.

It is particularly appropriate that the more explicit policy of the Clayton Act be used to illuminate the general terms of the Sherman Act in situations where the former statute is indisputably applicable to cases indistinguishable in anti-competitive consequences. Thus, in *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, tying agreements which could not be reached under the limited enumeration of "commodities" in Section 3 of the Clayton Act were held to violate Section 1 of the Sherman Act, although the vendor did not possess the "monopoly power" or "dominance" over the tying product which had previously been thought necessary for a Sherman Act violation. 356 U.S. at 10, 11. Compare *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 608–611. Similarly, in *Federal Trade Commission* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, this Court appears to have absorbed the policy of Section 3 of the Clayton Act into the Sherman Act (and thereby

into Section 5 of the Federal Trade Commission Act) to condemn exclusive dealing contracts in a situation where the more specific provisions of the Clayton Act were inapplicable solely because of the nature of the contracts. 344 U.S. at 397. The quantity of business affected in the *Motion Picture* case was substantially less than that in *Standard Oil Co.* v. *United States*, 337 U.S. 293, previously the leading decision under the Sherman Act relating to exclusive dealing (344 U.S. at 401–403, dissenting opinion).

Third, the same facts which compel the conclusion that the joint venture had the anticompetitive effect proscribed by Section 7, also condemn the arrangement as a combination "in restraint of trade" under Section 1 of the Sherman Act. As we have shown *supra*, pp. 35–44, the parents' capability to enter the market independently, considered along with the favorable economic conditions therein and each company's long sustained interest in entering the market on its own, established a high degree of probability that, but for the joint venture, either both would have entered the market or, at worst, one would have done so with the other remaining a highly significant potential competitor. The loss to competition in either event is plain, immediate, and substantial; the restraint of trade was full-grown, eliminating at once a highly important competitive force in a market wholly controlled by a very small number of competitors. This is thus not a case such as only the Clayton Act can reach, involving restraints caught "in their incipiency

and well before they have attained such effects as would justify a Sherman Act proceeding" (S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5).

CONCLUSION

The judgment of the district court should be reversed, and the case should be remanded for entry of an appropriate decree.

Respectfully submitted.

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APPENDIX

PX 1–375, inclusive, were offered into evidence at R. 30–39.[1] See R. 24. They were received by the court at R. 62.

PX 376 was offered and received into evidence at R. 61.

The parts of PX 377–411 which have been printed were offered into evidence at R. 44–59, and were received at R. 62.

The unprinted parts of PX 398, pp. 12–15, 29–30, 60–61, PX 400, p. 146, PX 408, pp. 195–196, referred to in the brief, were offered into evidence at R. 53, 54, and 57, respectively. They were received at R. 62.

PX 412–414 were offered and received into evidence at R. 62–66.

PX 415 was offered and received into evidence at R. 194–199.

PX 416–428, inclusive, were offered into evidence at R. 418. They were received at Tr. 824. See Tr. 795, 844.

DX 45 was offered into evidence at R. 418, and was received at Tr. 824.

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[1] The printed record (R. 38) lists PX 325 twice and omits PX 327. The second listing (Penn-Olin Bank Statement 6–61) should be PX 327. See Tr. 154.

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